

Maine Department of Conservation

MAINE LAND USE REGULATION COMMISSION

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Guidelines for Selection of Conservation Easement Holders

DRAFT REVISIONS

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MAINE LAND USE REGULATION COMMISSION
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I. Introduction and Purpose

The Maine Land Use Regulation Commission was established in 1969 to serve as the planning and zoning board for areas of Maine which lack local governments empowered to exercise local land use controls. Those areas today encompass 10.3 million acres, nearly one half the geographic area of Maine. The Commission's principal statutory responsibilities are contained in 12 MRSA, Sections 681 et seq. The primary responsibilities of the Commission are to prepare a comprehensive land use plan for these areas; to determine the boundaries of areas within the unorganized areas of the State that fall into various land use districts (zoning); to prepare land use standards for each district; to review and act upon applications for development in the unorganized areas of the State; and to carry out an enforcement/compliance program.

In reviewing and acting upon applications for development, the Commission may require, as an enforceable condition of approval, or applicants may propose conservation easements for the protection of significant natural resources as part of a development proposal. Conservation easements convey certain conservation rights in a parcel of land to an appropriate public or land conservation entity, approved by the Commission, to hold and protect forever the long term. It is crucial that such easements be actively monitored and enforced to insure that the conservation values continue to be maintained into the future. *It is important, therefore, that the holder of such easements demonstrate, to the Commission's satisfaction, that it operates for public conservation purposes and has the commitment and capability to monitor and enforce the conservation easements it holds.*

The following considerations are intended to guide the Commission in determining the acceptability of a proposed holder of a conservation easement. These considerations are also intended to provide guidance to an applicant as to what is likely to be an acceptable holder of such an easement.

II. Guidelines for Selection

1. **Minimum Legal Requirements:** The organization must qualify as a holder under 33 MRSA, [↑]§476, sub-[↑]§ 2:

"2. Holder. "Holder" means:

- A. A governmental body empowered to hold an interest in real property under the laws of this State or the United States; or
- B. A nonprofit corporation or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic or open space values of real property; assuring the availability of real property for agricultural, forest, recreational or open space use; protecting natural resources; or maintaining or enhancing air or water quality or preserving the historical, architectural, archaeological or cultural aspects of real property."

Demonstration: Enabling statute in the case of a governmental body. In the case of a nonprofit corporation or charitable trust, Internal Revenue Service certification and articles of incorporation and bylaws that demonstrate conformance with this definition.

2. **Public Agencies:** Since by their very nature, public natural resource agencies are charged by law to protect or manage a public interest, the Commission will give preference to such agencies to hold conservation easements, so long as they meet the purposes and intent of the Commission.
3. **Compatible Goals and Purposes:** The organization must have land conservation as a primary goal or purpose and must otherwise have goals and purposes which are consistent with the purpose(s) of the easement and conservation of natural values. The organization may have goals in addition to land conservation so long as its goals, and primary appeal for public support, are not potentially in conflict with the conservation goals of the easement.

Demonstration: Articles of incorporation and bylaws and other official written statements of goals and purposes. Secondary demonstration by documentation of its activities by newspaper articles, correspondence, reports, newsletters, minutes of board meetings, fund-raising literature and appeals for support, etc.

4. **Board Accountability:** The agency head or Board of Directors of the organization (not staff, advisory groups, or committees) must commit to and assume legal responsibility and accountability for the affairs of the organization and for monitoring and enforcement of the easement.

Demonstration: Letter from agency head or Board of Directors on behalf of the organization attesting to both this commitment and providing the names list of the members of the Board of Directors and backgrounds.

5. **Conflict of Interest:** The organization must not operate for the benefit of private individuals or corporations, but rather must operate in the public interest. Generally, advocacy groups are not appropriate holders of easements because of potential conflicts of interests with their responsibilities to hold and enforce easements in the manner prescribed by the Commission. The donor of the easement may not be a board member, founder or have a controlling relationship with the holder. The donor may, however, contribute stewardship funds dedicated specifically to monitoring and enforcement of the subject easement.

Demonstration: Articles of incorporation and bylaws and other evidence of goals and purposes. Disclosure of any donations to the holder by the landowner, that person's family or any entity controlled or funded by them and disclosure of total annual support from all sources combined. Disclosure of other relationships between holder and landowner.

6. **Financial Resources:** The organization must demonstrate adequate financial resources and commitment to use those resources to periodically inspect the easement area and enforce the easement provisions.

Demonstration: Letter from bank or other 3rd party showing financial capability. Budget of organization including portion of budget allocated to oversight and enforcement of easement and letter of commitment to use those resources.

7. **Monitoring:** The organization must show a commitment to regular inspection and monitoring of the easement no less than once a year by qualified personnel. The holder must agree to make an annual (or more frequent) report of its monitoring activities, in a form prescribed by the Commission.

Demonstration: Letter from agency head or Board of Directors and wording of easement regarding frequency of monitoring. Establishment of program or protocol authorized by the Board of Directors for inspection and enforcement, including use of qualified personnel, periodic reports, responsibilities and authorities, and steps to be taken if noncompliance is found, including mechanism by which organization decides to take enforcement action (e.g. vote of Board of Directors).

8. **Enforcement:** The organization must show a track record and/or capacity to commitment to enforcement of the conservation easements.

Demonstration: Record of previous enforcement actions or evidence of ability to take action against a landowner, contractor or other potential violator. Letter of intent from the agency head or Board of Directors to enforce the provisions of the easement. If the organization has dealt with easement violations before, what action did it take and with what results?

9. **Back-up Holder:** The Commission may require designation of a willing contingent holder to which the easement will be transferred should the initial holder demonstrate non-performance of its responsibilities as holder. The Commission often will require a back-up holder, which shall have the right to enforce the terms of the easement and to have all the rights of the holder, in the event the holder ceases to exist or fails to

undertake monitoring, enforcement and other holder responsibilities under the easement. The back-up holder must receive all notifications given to the holder of the easement and must join in any matter requiring the holder's consent. The Commission may impose, as a condition to a permit or other approval of a project with respect to which the easement is offered, the right to directly enforce the restrictions of the easement, but it shall be the holder's primary responsibility to do so. The back-up holder may be a government entity or conservation organization, in either case with a commitment and capacity that allows the Commission to have confidence that the responsibilities of the easement holder will be met forever.

10. **Transfers:** The Commission must be given an opportunity to approve transfer of the easement to another holder.
11. **Compliance with Laws:** The entity holding the easement must demonstrate a satisfactory track record and commitment with regard to knowing and complying with laws applicable to it, including without limitation, with respect to with respect to a charitable organization, 5 M.R.S.A. § 194 et seq.
12. **Commission discretion:** The Commission has the final discretion to decide whether a holder or the terms of a conservation easement are satisfactory for purposes of accepting the easement as a part of a project. These guidelines are for guidance only, are not a rule, are not legally enforceable and are designed to be employed by the Commission to assist it in making these decisions.

III. Effective Date: These guidelines for selection of easement holders are applicable after adoption by the Maine Land Use Regulation Commission.

Originally adopted by the Maine Land Use Regulation Commission on December 16, 1993. ADOPTED BY THE MAINE LAND USE REGULATION COMMISSION THIS 16TH DAY OF DECEMBER, 1993. Amendments adopted by the Commission on _____, _____, 2004.

By: _____
David E. Boulter, Director

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